

IN
**The United States Circuit
Court of Appeals**
Ninth Circuit

**THE STEAMER SAMSON, and BARGE No. 8,
BARGE No. 9 and BARGE No. 27**

**COLUMBIA CONTRACT COMPANY,
a Corporation**

CLAIMANT AND APPELLANT

**SHAVER TRANSPORTATION COMPANY,
a Corporation**

LIBELLANT AND APPELLEE

**STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation**

RESPONDENT IN PERSONAM

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON**

**Brief on Behalf of the Libellant
and Appellee**

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Proctors for Libellant and Appellee

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Proctors for Appellant

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Proctors for Standard Oil Co.

FILED

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THE STEAMER SAMSON, and BARGE No. 8,
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COLUMBIA CONTRACT COMPANY,
a Corporation,
Claimant and Appellant.

SHAVER TRANSPORTATION COMPANY,
a Corporation,
Libellant and Appellee.

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation,
Respondent in Personam.

**Brief on Behalf of the Libellant
and Appellee**

*Appeal from the District Court of the United
States for the District of Oregon.*

STATEMENT OF THE CASE

This appeal arises out of the following facts:
In July, 1911, the Standard Oil Company's tank

steamer Barge 93, an ocean-going barge of two hundred and eighty-four feet length and carrying twenty-five thousand barrels of oil, was ascending the Columbia River in the night time. The oil barge had no motive power of her own and was being towed by the libellant's river steamboat M. F. Henderson, a boat about one hundred and sixty feet long. The Henderson was lashed to the port quarter of the barge and was completely controlled by the employees of the Standard Oil Company on the oil barge. The Henderson was merely the propelling force. She was doing no steering. The officer in command of both boats was Pilot Sullivan on the fo'c'slehead of the oil barge and all steering was done by the oil barge. A pilot was in the pilot-house of the Henderson, but the helm of the Henderson was kept amidships except when ordered changed by Pilot Sullivan on the oil barge.

These two vessels proceeding upstream at a speed of about three miles an hour met the Columbia Contract Company's sea-going tug Samson with three rock barges in tow coming down the river. The Samson had the three rock barges in front of her, pushing them, and the center barge projected in front of the other two in what is known as a "spike tow." All were lashed together. These approaching vessels sighted each other a long distance apart, between one and two miles. The night was dark but

clear, no fog, and lights were easily discernible. The river at this point is about a half a mile wide with deep water practically from shore to shore. When the vessels were about a half a mile apart the oil barge blew one whistle, which was answered by the Samson, signifying a passage to port. The vessels continuing to approach each other, the oil barge blew another whistle, signifying her continued intention to keep the starboard hand and pass to port, but the evidence is conflicting whether this one was answered by the Samson or not. At any rate the collision occurred soon after and one or two of the rock barges (the evidence is conflicting) crushed into the port bow of the Henderson and sunk her almost immediately. The libellant and respondent, Standard Oil Company, claim that the collision took place close to the Oregon shore. The claimant insists that it took place close to the Puget Island, or Washington shore. This place of collision is a vital point in the case.

The Henderson was torn loose from the oil barge, sunk, and drifted down stream. The oil barge let go her anchors almost immediately, as we claim, but about three minutes after the collision, as claimed by the claimant. At any rate, when she swung to her anchors she was less than her own length from the Oregon shore, and we contend that this fixes the place of collision and the responsibility for the accident.

The Henderson, drifting down stream, came to her final lodgment at the head of Tenas Illihee

Island in twenty-seven feet of water at low tide, and after a good deal of trouble, due to the strong current and the fact that the boat was turned over more than on her beam end and had to be straightened up before she could be raised, was finally successfully raised by the libellant, towed to Portland and hauled out on the ways of a local shipyard, where she was surveyed and determined to be such a wreck that she could not be repaired. It cost to raise her and tow her to Portland between eight and nine thousand dollars. Her machinery was badly twisted and tangled, but was straightened out and eventually used in a new boat which the libellant built and named the Henderson, and which is sometimes referred to in this case as the new Henderson. The value of the machinery, boiler and iron work which made up the salvage of the wreck was \$16,835.00. About this there is no dispute.

The libellant, after investigating the circumstances, came to the conclusion that Pilot Sullivan of the Standard Oil Company, had acted properly and that the fault for the collision lay with the Samson and her barges. It therefore libeled the Samson and her barges, claiming a total loss. The claimant of the Samson and her barges (all of which belonged to the same corporation), in its answer alleged in effect that the fault lay with the oil barge. The libellant then, in order to bring all the parties before the court, filed a supplemental libel against the Samson and her

barges *in rem* and the Standard Oil Company *in personam*, and charged the Samson and her barges with being solely at fault but said that the Samson's answer sought to lay the blame on the oil barge and if the proof at the trial should support the contention of the Samson then the Standard Oil Company would be liable to the libellant for its damages, since the Standard Oil Company's pilot Sullivan had sole control of the libellant's boat. In other words, the libellant availed itself of the privilege given in admiralty of pleading hypothetically. The trial judge found the Samson and her barges solely at fault, and awarded the libellant \$30,870.75 damages, with interest and costs. The damages asked by the libellant are in round numbers about \$37,000.00. This sum with interest the libellant asks from the claimant Columbia Contract Company as being the one solely at fault. If, however, your Honors should believe that the Standard Oil Company was at fault and not the Samson then the libellant asks that it recover from the Standard Oil Company. It is entitled to recover from one or the other. The fact that it has not appealed from the decree does not preclude it from asking that the sum awarded by the decree be raised, *Irvine v. The Hesper*, 122 U. S. 256, 7 Sup. Ct. Rep. 1177; *The San Rafael*, 141 Fed. 275; nor from recovering against the Standard Oil Company should your Honors hold that company to have been in fault. *Hume v.*

Frenz, 150 Fed. 502, 504; The Galileo, 29 Fed. 538; The Umbria, 59 Fed. 489.

A word may be appropriate here in regard to the Hunting Island Range, for it appears constantly in the testimony. It is formed by two lights down the river two or three miles below the place of the collision. These lights were placed to mark a dredged channel across a sand bar below the foot of Puget Island, but by chance they also mark approximately the center of the channel further up the river, and are constantly used by the pilots in navigating this upper reach of the river abreast of Puget Island. According as a boat is one side or the other of this range, it may be said to be on one side or the other of the river in this upper reach, and consequently in locating the place of this collision the witnesses constantly refer to their boats as being on one side or the other of the range.

ARGUMENT

**DECREE MUST BE AFFIRMED UNLESS
CLEARLY AGAINST THE EVIDENCE.**

This appeal involves principally questions of fact. Appellant has a hard task. To win he must show that the decree is overborne by the heavy weight of the evidence. It will not do for him to show that the evidence is conflicting, and that his theory is reconcilable with one part of it. It will not even do for him to convince your honors that if you had been the triers of fact in

the first instance you might have decided differently from the trial court. The decree from which this appeal is taken comes here with the prestige of Judge Cushman's opinion behind it. Judge Cushman sat for a week and heard the witnesses testify and looked them in the face and questioned them himself. Only part of the rebuttal and the evidence as to the amount of damages was taken by deposition. For one whole week Judge Cushman listened to the testimony on the main question of liability. To set aside the decree he rendered, your Honors must be convinced from the cold bare words of the printed record that his decision was clearly against the great weight of the evidence. This is the well-settled rule in admiralty appeals, and appellant must face it all through this case.

Spencer v. The Dalles P. & A. Navigation Co., 188 Fed. R. 865, C. C. A. Ninth Circuit, 1911.

The J. G. Gilchrist, 183 Fed. R. 105, C. C. A. Second Circuit, 1910.

Cooper v. The Saratoga, 40 Fed. R. 509, Cir. Ct. S. D. New York, 1889.

On page 2 of their brief appellant's proctors admit that the evidence in this case is not only conflicting, but irreconcilable. '

We do not rest on this principle alone, however, but contend that the EVIDENCE IS OVERWHELMING AGAINST THE APPELLANT. We

shall analyze it as briefly as is consistent with its great volume and the necessity of pointing out its decisive features.

THE LOCATION OF THE OIL BARGE 93 AT ANCHOR AFTER THE COLLISION SHOWS WHO WAS AT FAULT.

Appellant claims that the Samson and barges were coming down the river on their own right-hand side, close to the Puget Island shore, where they should have been according to the whistles which had been exchanged, but that the Henderson and oil barge, instead of keeping to their righthand side as agreed, wrongfully steamed up the side which had been assigned by the whistles to the Samson and barges, and that the collision occurred on that side, and consequently the fault was that of the oil barge and Henderson.

We claim, on the other hand, that the oil barge and Henderson, coming upstream, kept well over to their own righthand side, in obedience to the whistles, but that the Samson and barges, instead of conforming to those whistles, kept crowding the oil barge and Henderson toward the Oregon shore until there was actually danger of going aground, that the collision occurred close in toward the Oregon shore under what is known as Bugby's Bluff, and consequently the blame must rest entirely on the Samson and her barges.

The place of collision is a vital point. Where that place was is best determined by the position of the oil barge at anchor immediately after the collision. It is admitted that when she lay at anchor she was very close to the Oregon shore—from 150 to 300 feet from the beach. She was going slowly at the time of collision. Her anchors were down within thirty seconds after the crash. She was a helpless floating mass, without motive power after the Henderson was torn away, and it was vital to get her under control quickly. The only way to do it was to get her anchors down immediately. And it was done in thirty seconds. The bottom was good holding ground, the anchors weighed 7,000 and 6,300 pounds, respectively, and she did not drag them. When daylight came she was found to be almost on the Oregon beach. That shows where the collision occurred and should end this case right here.

The foregoing facts were faintly disputed, but a reading of the record will show that they were practically uncontroverted.

Sullivan, the pilot of the oil barge, had ordered the boatswain to stand by the anchors before the collision, ready to let go. His thought was, that even if a collision were avoided, he would be so close inshore that he would have to use the anchors to keep from going aground. At the moment of collision he ordered the anchors let go. They are held on a compression

gear which is instantly released by a turn of a wheel, and were let go thirty seconds after the boats crashed together.

(Sullivan. Apostles, pp. 109-111.)

Alexander Martinson was the man who let the anchors go. He testified as follows (Apostles, pp. 112-115):

"Q. Mr. Martinson, what is your business?

"A. I am boatswain.

"Q. I didn't understand you.

"A. I say I was boatswain.

"Q. What is your regular business now?

"A. Sailor.

"Q. How long have you been a sailor?

"A. About for 30 years.

"Q. In what parts of the world?

"A. All parts of the world.

"Q. Were you on Oil Barge 93 at the time of the collision with the Samson and her rock barges?

"A. Yes, sir.

"Q. What position were you in then?

"A. I was boatswain at the time.

"Q. Where were you on the oil barge?

"A. I was on the forecastle head—forecastle head.

"Q. What were your duties there

"A. Well, I was assisting the pilot. I was keeping look-out, you know, along with the pilot.

"Q. How long had you been on watch—do you remember?

"A. Just about an hour and a half. I came on watch at 12 o'clock.

"Q. What orders did you get from Captain Sullivan about letting go the anchors of the barge?

"A. Well, the only thing what I remember, that is when he sung out 'Let go the anchor,' and I let these anchors go. That is all I can remember. That is a long time ago.

"Q. Well, tell me what you did, how you let go the anchors.

"A. Well, there is just a round wheel you have, kind of compression, and you just open that up a little bit and the anchor goes right down.

"Q. Where were you when he sung out to let go the anchor?

"A. Well, I was about amidships; about 40 feet away somewhere, from the anchor.

"Q. About 40 feet away from the anchors?

"A. Yes, about 40 feet away at the time he sung out.

"Q. And what deck were you on?

"A. On the main deck at the time.

"Q. How did you happen to be on the main deck? That wasn't your regular position, was it?

"A. No, sir, but when I saw there was going to be a collision I went off the forecastle head,

and went down on the main deck, and I had in my mind to go and close those water-tight doors.

“Q. How quickly did you let go the anchors in regard to the time of the collision?

“A. That is only a matter of second, you know. About 20 or 30 seconds, something like that; only made a couple of jumps and I was right there, and opened up and the anchors went right down. That is only a matter of a few seconds.

“Q. How many anchors did you let go?

“A. Let go first the starboard, then I went over to the other side, the port, afterwards.

“Q. How did they go out—fast or slow?

“A. Well, they go out fast, you know; when we open up, they go out fast.

“Q. And after the anchors hit the bottom, how do the chains go out?

“A. That depends on the headway of the ship. If the ship's got much headway, go fast. If the ship got slow headway, go slower.

“Q. How did they go this night?

“A. Slow.

“Q. This night, after the anchors hit the bottom, the chains went out slow—is that right?

“A. Yes, sir.

“Q. Did the oil barge have much headway that night, at this time—at the time you let go the anchor?

"A. I don't think so. Very little headway.

"Q. Do you know how much anchor chain you had out?

"A. I couldn't tell. I don't know.

"Q. Where was the barge in relation to the shore, when she lay at anchor—when daylight came?

"A. Was pretty close on the Oregon shore.

"Q. About how close?

"A. Well, I couldn't tell you exactly the distance, but I don't think there was room enough for a barge to swing without touching the shore, in my estimation.

"Q. You mean she would be less than her own length from the shore?

"A. Yes, I think something like that, because I don't think there was room enough to swing.

"Q. Had she moved any from the time the anchors held her, after the collision, until the next morning?

"A. No, sir, she hasn't moved any."

Charles Kayser, a young sailor who had been asleep in his little stateroom on the starboard side of the foc'sle, a few feet from the anchor gear, was wakened by the crash of the collision, and saw Martinson leap to the anchors and let them go. He testified as follows (Apostles, pp. 133-135):

"Q. What is your occupation?

"A. A seaman.

"Q. How long have you been a seaman?

"A. About 12 years.

"Q. How long have you been on the oil barge?

"A. Twenty months now.

"Q. You were on her at the time of this collision with the Samson?

"A. Yes, sir.

"Q. Where were you on the oil barge at the time of the collision?

"A. In my bed.

"Q. What woke you up if you were asleep?

"A. The crash of the Samson running into the Henderson.

"Q. Had you heard anything else before that?

"A. I heard our whistles. I heard one whistle and then fell asleep again, and heard another whistle shortly after that. I fell asleep again after the second whistle.

"Q. You were just half asleep there?

"A. Yes.

"Q. And the crash woke you up?

"A. Yes.

"Q. Then what did you do?

"A. I jumped out of bed, half undressed and run up on deck. I thought we were on the rocks or something, and when I was running out, Martinson came running in, and we ran

to the anchors, and I asked what was the matter, and he didn't answer me. Just went for the anchor and let go the starboard anchor and then the port, before I saw the Henderson drifting to stern, she was sinking.

"Q. How far had you run from your bunk to where you met Martinson?

"A. About 18 or 20 feet.

"Q. And Martinson was running in? Is that it?

"A. Yes.

"Q. How soon would you say it was the anchors were let go after the collision?

"A. Oh, it was only a matter of seconds. Just the time it took me to run out from my bunk, to run these twenty feet and for Martinson to run for the anchors.

"Q. How far did he run to the anchors from the point you met him?

"A. Probably 25 feet.

"Q. How did the oil barge come up on her anchor chains?

"A. Very slow. I noticed that when the starboard anchor was down, I could just watch the chain going out. I think Martinson left the brake open, and the chains could hardly go out any more.

"Q. Hardly go out any more after the anchor hit the bottom?

"A. After the anchor was on the bottom."

Wm. Kalberg was the helmsman at the wheel in the little wheel-house on the fo'c'sledeck directly over the anchor gear in the fo'c'sle beneath. He, of course, had his attention riveted on his wheel, but he heard the order to let go anchors and heard them go. He says (Apostles, p. 2022):

“Q. Did you hear any orders given?

“A. Oh, yes. Captain Sullivan says to drop the anchors instantly, and that was what was done, too.

“Q. How do you know?

“A. I could hear it. That is why.

“Q. How long after the collision were the anchors let go?

“A. Well, the time was so short, you know, they may not have been a half minute and they may have been a minute; but I am satisfied it was no more.”

Captain Sorley was master of the oil barge. He came on deck in his underclothes a few seconds after the collision. He testified (Apostles, 2039-2040):

“Q. Now, as soon as you got on deck that night what did you do with reference to giving any order to let go of the anchors?

“A. I immediately told them to let go of the anchors.

“Q. And did you hear anybody else give any order to let go of the anchor on the barge?

"A. That order was given forward about the same time.

"Q. What sort of anchors was the barge equipped with?

"A. Patent anchors.

"Q. And how soon can they be let go after an order to let go is given?

"A. Oh, if you are on hand it is only a matter of a second or two—less than that.

"Q. How soon, in fact, were the anchors let go that evening after the order was given to let them go?

"A. Oh, a few seconds; probably four or five seconds; it could not be any more.

"Q. What has to be done in order to let go of the anchor; in order for the anchor to pay out?

"A. Just simply pull the lever over.

"Q. How soon would you say the anchor was let go after the order was given?

"A. Just a matter of a few seconds, possibly ten seconds altogether."

Phil Crossen was a deckhand or watchman on the Henderson. Counsel, on pages 21 and 58 of their brief, evidently think he was a lookout and blame him for having been in the galley of the Henderson shortly before the collision, and for having paid no attention to the lights on the Samson and her tow (counsel by inadvertence say Henderson and her tow), and for not knowing where he was in the river. This arises from

a misapprehension of his duties. A "watchman" on a river boat is not a lookout. He is a night deckhand. He is a general handy man around the boat to do whatever may be necessary—wake the men for their different watches, run an errand to the pilot house—anything. On freight boats he also has charge of the freight, and this is probably where he gets his name of "watchman." Crossen himself, if any testimony were needed, makes it evident he was not a lookout. He says he was "deck boy, deckhand, so far." Apostles, p. 1228. With this slight digression, we return to the subject of the anchors.

When the Henderson was torn away by the collision Crossen leaped upon the oil barge and was on her when she anchored. He testified as follows (Apostles, pp. 1231-1232):

"Q. Were you on the oil barge when she anchored?

"A. Yes, sir.

"Q. Did you see them anchor?

"A. I heard them anchor; I didn't see them.

"Q. Where were you standing on the oil barge when she anchored?

"A. On her stern.

"Q. And what did you hear?

"A. I heard the chains going down, I heard the hawsers.

"Q. How long after you got aboard of her did this occur?

"A. Dropping anchor?

"Q. Yes.

"A. It wasn't half a minute.

"Q. She dropped the anchor pretty much about a half a minute after you got aboard of her?

"A. Yes, sir, I should judge about that.

"Q. And how long did she go on her anchors before she came up on them?

"A. I don't think she went very far, because we were backing up for about a minute, I guess, before the collision, to my knowledge. Then when they hit, then it was quite awhile before the lines parted. I don't think she went the length of herself, the oil barge; because I looked out. I wanted to see where we were. After the Henderson broke loose I wanted to see where we was, and we were drifting down stream.

"Q. The oil barge?

"A. Yes, sir. It wasn't going up stream at all.

"Q. How far were you from the Oregon shore?

"A. About one hundred and fifty or two hundred feet, I should judge.

"Q. And you could see the outlines of the shore?

"A. Yes, sir."

All of this testimony of men who were right on the scene of action is corroborated by the

fishermen who were drifting on the river that night, and heard the anchor chains rattling through the hawse-pipes, and are independent witnesses uninterested one way or another in the result of this case.

Eddie Grove, a fisherman, said (Apostles, p. 292):

“Q. Did you hear any anchor chains going out?

“A. I heard anchor chains go right after the crash.

“Q. How did it seem to you that these danger whistles were blown? A long or short time or what time before the collision?

“A. Oh, it was all at the same time; first the whistles, then the crash, then the anchor, right after it.

“Q. Then the anchor, did you say?

“A. Last, yes.”

Martin Loaland, his fishing partner, said (Apostles, pp. 335-336):

“Q. Did you hear the collision?

“A. Yes, sir.

“Q. You heard the boats come together?

“A. Yes, sir.

“Q. Did you hear anything more?

“A. I heard a big noise.

“Q. A big noise.

“A. Yes.

“Q. Did you hear the anchor chains?

"A. Yes, sir; Eddie says—

"Q. Then what happened? What did Eddie say?

"A. I asked Eddie what that noise is. He said account of anchor chains go out.

"Q. And how soon was that after the collision?

"A. Just the same time.

"Q. You say that the danger whistles and the collision and the anchor chains were all very close together?

"A. Yes, sir."

Elias Dahl, another fisherman, said (Apostles, p. 358):

"Q. Did you hear the anchor chains that have been spoken of?

"A. Yes.

"Q. How long after the crash of the collision did the anchor chains go out?

"A. I don't know. All together. All at once. The whistles and the crash and the anchor chains, all together."

His fishing partner, Ole Grove, said (Apostles, p. 424):

"Q. How long after the collision did you hear these anchor chains you spoke of?

"A. They was just about the same time."

Against this overwhelming mass of testimony about the anchors there is practically nothing.

Most of the crew of the Samson testified that they did not hear the anchor chains of the oil barge, and from this counsel attempts to draw the inference that the anchor chains did not go out soon after the collision. It is noteworthy that the men who so testified were men who were stationed in enclosed places like the engine room, or else were men who had just been awakened out of a sound sleep, and rushed on deck. Is it strange that in the confusion of a collision these men heard no anchor chains on the oil barge?—especially since the Samson had gone on down stream. Pilot Jordan says he heard the anchor chains about three minutes after the collision, but admits he had no reason to fix the time. “That was just my notion of it,” he said (Apostles, p. 715). Peterson, the helmsman, the only other man beside Jordan who was in a position to hear, was not asked about the chains. Appellant tried to show on the trial that the oil barge was going faster than we said and, under her headway, after the Henderson was torn loose, would drift between a quarter and a half mile *upstream* and athwart the current in a strong June freshet, before her anchors were down; also that the backing of the Henderson before the collision, and the impact of the Samson, and consequent snapping of all the tow lines holding the Henderson and oil barge together, would have no retarding effect on the headway of the oil barge; also that the oil barge anchors would drag on the bottom, al-

though it is uncontradicted that this was a good and often used anchorage ground.

As to all these things we are content to let your Honors read the record and reach your own conclusion without argument; calling attention, however, upon the question of the speed of the oil barge, that Peterson, the Samson's helmsman, testified that the oil barge went by "slowly, very slow." (Apostles, p. 1214.)

THE POSITION OF THE HENDERSON ALSO INDICATES THAT THE COLLISION WAS ON THE OREGON SIDE.

The Henderson was a helpless wreck from the moment of the collision. With a hole in her side 40 feet long, her steam pipes broken and power gone, she filled immediately, turned on her side and sank—not, however, to the bottom. She floated, submerged, a little of her side being above water. This helpless waterlogged wreck drifted down stream and brought up on the point of Tenas Illihee Island, on the *Oregon* side of the river. Her position is admitted by all. The testimony is overwhelming that it would have been impossible for her to get where she did, had the collision been where the Samson claims it was. We refer to the testimony of the fishermen particularly. On the other hand, they all say that if the collision took place where we say it did—close to Bugby Bluff—the Henderson drifting from

that point would have brought up exactly where she did.

Ostervolt, Apostles, pp. 1254-1256.

Johnson, Apostles, p. 1309.

Ole Grove, Apostles, pp. 1312-1313.

Eddie Grove, Apostles, pp. 327-329.

Martin Loaland, Apostles, pp. 339.

Elias Dahl, Apostles, pp. 361-363.

Charlie Johnson, Apostles, pp. 392-393.

Ole Grove, Apostles, pp. 428-429, 434.

These men are all fishermen who drift their salmon nets at this point year in and year out and should know the currents if anyone does, and are independent witnesses. The testimony of the river captains and pilots, Moran, Shaver, Smith, Pease, supports them. (Apostles. pp. 1180-1182, 1333-13337, 1409-1412, 1430-1431.)

Three of these pilots are independent witnesses, unless it can be claimed that because they belong to the same Pilots' Association that Sullivan does renders them biased. They are in marked contrast to those pilots who contradict them, every one of whom is an employee of the claimant.

Claimant has tried to offset their mass of testimony by showing from testimony of its employees that there is a side suck of the current from the river into Clifton Channel, and that this would draw the Henderson from Puget Island (where the Samson claims the collision was) over to Tenas Illihee Island, where the wreck of the

Henderson was found. But, as Judge Cushman pointed out in his opinion, common sense is against this. The river at this point is 40 to 60 feet deep—Clifton Channel is 12 or 14. It needs no argument to show that the water would follow the deep main channel and not go off at a tangent down a shallow slough. This court could hardly accept that theory even if it was not overwhelmed by the mass of testimony we have brought against it.

But, appellant says, the Samson took hold of the wreck of the Henderson and nosed and pushed her over to the Tenas Illihee shoals; that is how she got there. This shows to what extremes appellant is driven. Their own captain, Jordan himself, testified that any pushing the Samson did on the Henderson was futile; that they did not move her.

After having located the position of the wreck of the Henderson, after the Samson left her, as a point "L" on the chart, he testified as follows (Apostles, pp. 718-719):

"Q. Now, then the collision occurred at where you have marked the point "K" as the corrected point of the collision. The Henderson if she had no power, if her steam pipes were broken, must have drifted with the current, and she drifted over practically to the point "L," did she?

"A. Yes, sir.

“Q. Where did you haul her from the point “L”?”

“A. Well, as I have testified before, we didn't do much hauling on her. We had a line on her. I don't suppose we backed up more than once or twice; only for a short time. The little backing we did, didn't have much effect on her.

“Q. You were practically drifting to point “L”?”

“A. Yes, sir.

“Q. You say she drifted with the current from the point of the collision across this deep water and down to the point “L”?”

“A. Yes, sir.

“Q. Then according to your theory the currents on that river or the currents from the Grove Slough make off towards Tenas Illihee Island?

“A. Yes, sir.

“Q. Now, your theory is then that she drifted from the point “K” or the point “A,” I don't care which, wherever the point of collision was, down to the point “L,” with the current setting toward Tenas Illihee Island?

“A. Yes, sir.

“Q. You didn't help her going to the point “L,” did you?

“A. What little help we did would not have had any effect on her, I don't think.”

THE POSITION OF THE ROCK BARGES DOES NOT CONTRADICT US.

Appellant lays great stress on the position of the rock barges as they lay at anchor after the collision. Counsel says that they were lying at the lower end of Puget Island, close to shore, and this shows that the collision must have occurred on that side. Not at all. In the first place it must be noted that it is very doubtful if the position of these barges was as close inshore as counsel would have us believe. The fishermen were the best of all people to know how these barges lay at anchor, because, as anchored, they interfered with the drifting of the nets. The fishermen thus had a special reason for noticing and marking the position. Some went right up alongside the barges at anchor. They all say that at least two of the barges were *anchored on the Oregon side of the Hunting Island Range*, i. e., on the Oregon side of the channel. Eddie Grove, Apostles, pp. 293-295; Loaland, Apostles, pp. 336-338; Dahl, pp. 359-360; Johnson, pp. 410-413; Ole Grove, Apostles, p. 473.

But even conceding counsel's location, for the sake of argument, there is nothing in that location that contradicts our case in the least. The Samson, with her barges, was coming down the river at a speed of at least seven miles an hour. That is admitted. It was in the June freshet, the tide ebbing and the current very strong. The Samson was only backing about 30 seconds be-

fore the collision. This could check but very little the momentum of herself and three barges, each loaded with 1000 tons of rock. When she struck the Henderson she was on a hard aport helm, swinging to starboard—toward Puget Island. All these facts are admitted. Under these circumstances it is very easy to account for the barges going from Hunts Mill Point to the foot of Puget Island. Their momentum and the starboard swing they had and the current would put them there. Counsel says they had no rudders and, when loosened from the Samson by the force of the collision, they would lose the effect of the starboard swing. He tries to put them in the same category as the Henderson—a helpless piece of drift from the moment of the collision. This is not the case. Even if they had been torn loose from the Samson, and even though without rudders, nevertheless they had acquired the starboard swing—they had already felt the influence of the Samson's rudders and had entered on the swing before the collision occurred. And we do not see how they would lose it. If we have learned anything from physics, the moving inertia of their mass would continue on the swing they were on when abandoned. But as a matter of fact they were *not torn loose from the Samson. Not even the port barge was torn loose from the Samson.* (Jordan, Apostles, pp. 604 and 723.) *She hung onto them for ten to fifteen minutes* (Jordan, Apostles, p. 681) *and anchored them at a*

place of her own choosing before she went back to the Henderson. (Jordan, Apostles, p. 634; Church, Apostles, p. 1071.) They were not helpless drift like the Henderson at all. The only piece of drift that was started from the point of collision, and, the plaything of the currents, followed them wherever they went, was the Henderson. She was as good as a piece of wood thrown overboard at the time of collision to mark, by its drift and ultimate lodgement, the place where the vessels collided, and her lodgement on Tenas Illihee is silent evidence of where the collision was. Among the conflicting mass of human testimony warped by the interest of the tellers, or faulty through lack of memory or inaccurate powers of observation, the wreck of the Henderson is a mute witness pointing to the truth.

THE HOLE IN THE HENDERSON'S PORT SIDE IS ANOTHER SILENT WITNESS.

The Henderson was rammed on the port side. This shows she was trying to escape the oncoming Samson by hauling off to the right. It is conceivable, of course, that she could have been so struck had she been over on the Puget Island side, but it is not probable. If, as appellant contends, the Henderson and oil barge had been coming up Puget Island shore and the Samson and barges had been going down that shore, they would likely have met head on, for there would not be

room for a vessel the size of the oil barge, and drawing 20 feet of water, to come along close to and parallel with the Puget Island shore and then suddenly veer off to the right, so that the Henderson could catch the blow on the port side. Vessels of that size turn on a long curve. They don't handle like tugs. It is much more likely that the Henderson and oil barge had hauled off to the right of the river and were continuing to haul further off and thus exposed their port side to the oncoming Samson.

This hole in the port side of the Henderson is especially inconsistent with appellant's claim because it is a part of their testimony that the Samson and barges were going downstream broadside and headed toward the Puget Island beach at the time of collision. (Jordan, Apostles, pp. 658, 714.) If they were so headed, then the oil barge and Henderson would actually have to be coming out of one of the sloughs on Puget Island and heading straight across the river, or even downstream, in order to catch the blow on the port side.

So far we have considered the silent evidence of the collision—the anchorage of the oil barge, the lodgement of the wreck of the Henderson, the hole in her port side. Counsel may object to our calling the anchorage of the oil barge silent evidence because it is not independent of oral testimony. Oral testimony is required to show the speed with which the anchors were dropped and

that the vessel could not travel far between the collision and the anchorage. But we consider the testimony and the inherent probability so overwhelming in favor of these facts that they must be accepted as established. And given them as established, then the place of anchorage of the oil barge becomes the strongest mute evidence of where the collision took place.

THE ORAL TESTIMONY.

Eight men, Sullivan, Kahlberg, Martinson, Stayton, Eddie Grove, Loaland, Dahl and Ole Grove, observed the course of the Henderson and oil barge prior to the collision and all unite that they left the Hunting Island Range and hauled well over toward the Oregon shore, heading toward Hunt's Mill Point and giving the Samson plenty of room. Every one of these men had some reason for noticing the course. Sullivan, Kahlberg and Martinson were on the oil barge in charge of her navigation. Stayton was on duty in the pilot-house of the Henderson and noticed Sullivan's course, and remembered it because he thought at the time that Sullivan was getting dangerously close to the shoals near the entrance of Clifton Channel (Apostles, p. 490). These were all men on the boats. The others were fishermen. Eddie Grove, like Stayton, noticed the course because of its near approach to the shoal water on the Oregon side. (Apostles, pp. 289-90.) So did Loaland (Apostles, pp. 333-34). Dahl noticed it

too, though he does not say why (Apostles, p. 357). Ole Grove noticed it because he observed the oil barge and Henderson swing to the left a trifle to pass his son Eddie and then swing back and head for Bugby Bluff, and the failure of the Samson to answer the second whistle of the oil barge attracted his attention to the position of the boats (Apostles, pp. 420-422).

The testimony of all these men is that they observed the course of the boats as above described, and that they actually saw the collision take place close to the Oregon shore at Hunt's Mill Point. They were *eye witnesses* to the collision, and four of them independent witnesses.

The nearness of the Oregon shore is shown by the apprehension of those navigating the oil barge that she would run aground. Sullivan makes it plain that the reason he ordered Martinson to stand by to let go the anchors was that, though he believed the Samson would still pass if she took the proper measures, yet she had crowded him so close to the Oregon shore that he was afraid he would have to drop his anchors, after the passage was effected, to keep from going aground. (Apostles, pp. 108-111.)

Martinson said (Apostles, p. 116):

"Q. Do you remember how your oil barge was headed after the order to put the oil barge hard aport?

"A. Was headed to the Oregon shore, right in, right for shore.

"Q. How far away did the shore seem to be?

"A. Well, it was dark. I thought we was on shore already, the way it looked to me in the dark.

"Q. You thought you were getting too close to shore?

"A. Yes, I thought we were on shore already, the way it looked to me."

Kahlberg said (Apostles, p. 2024):

"Q. Were you in any fear about going ashore that night, about running ashore?

"A. I thought sure we was going ashore.

"Q. Why?

"A. I was bearing right in on the bank then, right in on the beach.

"Q. Well, if the anchors had not been let go would you have gone ashore, in your opinion?

"A. In my opinion, yes; that would be all right."

We have, then, the testimony of eight men who actually saw the collision and place it at Hunt's Mill Point on the Oregon shore. Four of these are men who were on the boats themselves. Four are fishermen.

Opposed to these are only two men who say they observed the courses of the boats and saw

the collision and place it near Puget Island. One is Pilot Jordan of the *Samson*—the man on trial, as it were. The other is his helmsman, Peterson. Jordan did not tell the truth. His testimony is riddled with contradictions and impossibilities. Peterson we never had a chance to cross-examine. He did not testify in person at the trial, but by stipulation his testimony before the U. S. Inspectors was treated as a deposition. Peterson was simply a Swede who had learned his lesson and repeated it over and over again. It is distasteful to attack the testimony of these two men, but the truth requires it.

First, take Jordan. He has testified in every different way conceivable in this case. He has said that he came around the bend of Puget Island "very close" to the island shore (Apostles, p. 593), "right in close" (p. 621), "about 400 feet" off (p. 646); he has said that he was much further off—indefinite—"a little closer to the Island than to the Oregon side" (Apostles, p. 727). He has said that at the first whistle he was closer to Puget Island shore (Apostles, pp. 761, 633); he has said that at the first whistle he was "about the center of the river" (Apostles, p. 742). He has said that the collision occurred "almost on the ranges" (Apostles, p. 739), and told Captain Church that he "had just swung onto the ranges" at the time of collision (Apostles, pp. 1106-1107); he has said that it occurred above the ranges (Apostles, pp. 596, 601, 738, 684-685). He has said

it occurred in the middle of the river (Apostles, pp. 741, 743, 745); he has said it occurred close to Puget Island—about 800 feet off (Apostles, pp. 599, 655). He has said that he ran on a hard aport helm for 5 or 6 minutes before the collision (Apostles, pp. 761, 762); he has said that he carried a hard aport helm for only a few seconds before the collision (Apostles, p. 708). He has said that his helm was hard aport from shortly after the first whistle to the time of the collision (Apostles, p. 761), while he was running a distance of nearly half a mile (Apostles, pp. 597, 697); he has said it was not hard aport until the second whistle, when the boats were only 400 feet apart (Apostles, pp. 595, 598, 654, 658-660, 704, 708-709). He has said that when he first saw the oil barge and Henderson they were on the ranges (Apostles, p. 647); he has said that when he first saw them they were above the ranges, nearer Puget Island (Apostles, pp. 656, 633, 711). He has said that the green light on the oil barge shut out several times and for a sufficient length of time to indicate she was steering badly (Apostles, pp. 746, 747, 748); he has said that it shut out only once or, possibly, twice, and then only for an instant, as if a stay had momentarily passed in front of it (Apostles, pp. 634, 655, 662-663, 748-749), and that that was not the reason he thought she was steering badly (Apostles, pp. 752-753). He has said that the reason the wreck of the Henderson lodged on Tenas Illihee Island was be-

cause the Samson pushed her there—that “between towing and drifting and shoving her in there” she went two-thirds across the river with the aid of the Samson (Apostles, p. 606); confronted with his testimony before the Inspectors (Apostles, pp. 692-693) he admitted that the Samson had nothing to do with it (Apostles, pp. 718-719). He has said the current kept setting him away from Puget Island—i. e., toward the Oregon shore (Apostles, pp. 658-659, 764-765); he has said that this drift toward the Oregon shore was “very little” (Apostles, p. 776). He has said that the yellow paint from the beading on the oil barge was scraped off against the hull of the port rock barge (Apostles, pp. 769-770); he has said that it was not (Apostles, p. 770).

All of these inconsistencies, except perhaps the last, are upon points vital in this case. Making all due allowance for the natural errors in guessing at feet, distances and minutes, or for errors in charting courses by men not accustomed to it, Jordan’s testimony is so outrageous—the inconsistencies are so glaring, the untruths so apparent—that his whole story must be disregarded as unworthy of belief and the truth about this collision sought elsewhere. Indeed most of his inconsistencies do not involve guessing at feet or minutes or drawing charts, and cannot be explained by saying that they are things about which even an honest man might guess wide of the mark.

But even if you take Jordan's own story it shows that he was at fault. From the mass of contradictions that make it up, this seems to be his story: That he rounded the bend of Puget Island at a speed of seven miles an hour, with a tow that was hard to control; and he did this, although he knew he might likely meet vessels coming up, as is evidenced by the fact that he blew one long whistle before he made the bend (Apostles, p. 592); that when he rounded this bend and saw the oil barge and Henderson, he was about 400 feet off shore; that at that time he saw that the oil barge and Henderson were steering badly; that on receiving the first whistle he ported his helm and ran 5 or 6 minutes on a port helm (not hard aport), and all the time, instead of getting nearer Puget Island, was getting further out in the middle of the river; and yet not until the second whistle, thirty seconds before the boats came together, did he put his helm hard aport in an extreme effort to avoid the collision which took place immediately thereafter more than 800 feet off shore (pp. 726-727).

We contend that he was negligent even in approaching the bend at the speed he did, in the strong current of a June freshet, with a tow which he knew he could not control, and in a black night at that; and that after he got in the bend and was coming downstream in that current, with his unwieldy tow, at a speed of seven miles an hour, and saw, as he claims, that the oil barge

and Henderson were steering badly and he would have to give them plenty of room, and then saw that he was *not* giving them plenty of room, but was getting further out in the middle of the river instead of nearer in toward Puget Island shore, he should have immediately put his helm hard aport, and that he was negligent in his failure to do so and in waiting until thirty seconds before the collision before he put his helm hard aport in an extreme effort to escape. We claim that his negligence was gross in view of the belief he held that the oil barge was steering badly, and would have to be given all the room possible. Or if you accept his statement that he did all possible to avoid a collision, but that his tow was so unwieldy that the Samson, in running a distance of more than half a mile, could not bring it nearer the island shore, but, on the contrary, was continually set further away from the shore by the current, then you have to say that his tow was unmanageable and a menace to shipping, and it was negligence to attempt to navigate with such a craft.

He admits he couldn't control it (Apostles, pp. 658-659):

"Q. Still not seeing you were getting closer to the island, but, on the contrary, getting farther away, why didn't you give hard aport helm?

"A. I gave her hard aport helm just before the second whistle was given; she was swinging; heading toward the island all the way. I couldn't do more than keep her that way, but *she was going down broadside.*

"Q. Didn't you think it was your duty when nervous about his bad steering and trying to give plenty of room, when you were not getting closer to the island but further away, don't you think it was your duty to put your helm hard aport?

"A. She was going over all the time. Giving more port helm all the time.

"Q. Wasn't she going away from the island?

"A. I couldn't help that; *the boat wouldn't shove the scow in. That is all there was to it.*

"Q. Could have by giving hard aport helm, couldn't you?

"A. I don't think so; would have laid right across the current with hard aport helm.

"Q. Do you mean you couldn't control the tow there?

"A. *Not to get in the island that short a space, no, sir.*

"Q. How short a space is that?

"A. *About half way down; probably be half a mile, if a mile from this point to that (indicating). We was about half way down when the collision took place."*

Compare also page 687, where he speaks of the barges being hard to tow.

The only other witness for the Samson who attempts to tell what led up to the collision is John Peterson. He was Jordan's helmsman. Again we say we do not like the task of attacking the veracity of these men, but Peterson's testimony sounds like a lesson he has learned. Again and again and again he reiterates that the Samson's helm was hard aport from the time of the first whistle to the collision:

"A. He says 'Port' after the *first whistle*.

"Q. And how long after that before he gave you the order to hard aport?

"A. Well, I put it over *hard aport*.

"Q. When he told you to port you put it hard aport?

"A. Well, the bell didn't come right on then, because I didn't have my hand on it exactly. He says, 'Have you got her aport?' So just the time he spoke the bell went off.

"Inspector Edwards: The bell went off?

"A. Yes; the bell went off to indicate.

"Inspector Edwards: The indicator strikes the bell?

"A. The indicator strikes the bell.

"Inspector Edwards: Either port or star-board.

"Q. Was that before the second whistle was blown?

"A. That was before the second whistle.

"Q. When the bell went off it was hard over?

"A. When the bell went off it was hard over, yes.

"Q. After that time did it remain hard aport?

"A. *Hard aport up to the time of the accident.*" (Apostles, pp. 1207-1208.)

"Q. And when the *first whistle* did blow the captain said 'port the helm'?

"A. He says, 'Is it to port'? I says, 'Yes; port *hard over*,' I says.

"Q. Hard over at that time? You put it hard over?

"A. It was *hard over up to the time of the accident.*

"Q. *From the time the first whistle was blown?*

"A. *Yes, after he heard the first whistle he says 'port,' and I put it over, hard over.*

"Q. You put it hard over?

"A. *Hard over.*

"Q. And you remember—

"A. (Interrupting.) I remember he said, 'Have you got it over?' I says 'Yes,' and just the time he spoke the bell went off.

"Q. And that was after the first whistle?

"A. After the first whistle." (Apostles, p. 1211.)

"Q. Now, Mr. Peterson, did you do everything which you possibly could do, so far as steering your boat was concerned, after the first whistle was blown to get out your boat to port of the oil barge and Henderson? Was there anything you could do to have gotten your boat farther apart?"

"A. I could not do anything more.

"Q. You could not?"

"A. *No. great God! the wheel was hard over; I couldn't break it.*" (Apostles, pp. 1211-1212.)

"Q. I understand now, Mr. Peterson, that from the time you got a signal from the oil barge your helm was hard apart?"

"A. Yes, sir." (Apostles, p. 1217.)

"Q. Your pilot answered the whistle (i. e., the first whistle)?"

"A. Answered the whistle, yes, sir.

"Q. And you gave her to port?"

"A. Port.

"Q. How much?"

"A. *Hard over.*

"Q. Hard over?"

"A. Well, the bell didn't went off.

"Q. No, not at that time?"

"A. No.

"Q. But it was pretty well over?"

"A. Pretty well over." (Apostles, pp. 1220-1221.)

"Q. You had had her over all the time?

"A. I had had her over right along.

"Q. *Five minutes, you think?*

"A. *I should judge; I could not say exactly. I know she was hard over.*

"Q. You know she was hard over from the time you got the first whistle until the collision?

"A. *Yes, I know that for a fact.*" (Apostles, p. 1223.)

This is different from Jordan's story at the trial of this case, when he said the wheel was not hard over till the second whistle, a few seconds before the collision.

But it is exactly in accord with Jordan's testimony before the United States Inspectors. Remember that this testimony of Peterson's was not given at the trial of this case. It was given at the trial of Captain Jordan before the Inspectors. Jordan swore like Peterson then. They stayed together through thick and thin. Afterwards when it seemed tolerably clear that if they had run on a hard aport helm for the time they said they did, starting from the point close in to Puget Island shore where they said they did, they would have hit the bank—after Captain Church, Jordan's own captain, had given that as his opinion—then Jordan changed his story. But Peterson wasn't available the second time.

Peterson's testimony certainly has the appearance of a story which Jordan had coached him in

and both had agreed to tell. In fact Peterson says (Apostles, p. 1213): "Of course we went into the question after they run into us—" and was unfortunately interrupted. He was referring to the length of time Jordan backed before the collision.

These, then, are the only two men who say they saw the course of the boats before the collision and contradict the eight eye witnesses for the oil barge and Henderson. And of these two it is noteworthy that Jordan has placed the collision on the ranges and off them, in the middle of the river, and close to Puget Island, and that Peterson plainly does not know where it occurred at all. His testimony on this point is vague and is as follows (Apostles, pp. 1216-1217):

"Q. Did you look out about the time of the accident to see whether you were near the shore or not?

"A. *Well, I didn't take much notice of that.* I know we was pretty close where we turned around on the bend.

"Q. You were pretty close to the shore?

"A. Pretty close.

"Q. Did you go nearer the shore or further from shore from that time until the collision?

"A. Well, I should think we keep pretty close.

"Q. Think you kept about the same distance?

"A. The same distance probably.

"Q. Can you tell whether you were nearer to the Puget Island shore or to the Oregon shore?

"A. We was closer to the Puget Island shore.

"Q. You could not tell how near you were to the Puget Island shore?

"A. No, sir, not exactly.

"Q. About what is your estimate? About how far do you think you were from that shore?

"A. Well, I don't know. It might be nine hundred feet, or probably less. I could not tell.

"Q. You could not tell?

"A. I could not tell you, no.

"Q. You could see the shore, could you?

"A. *Well, I didn't take much notice of the shore that night; I will tell you that.*

"Q. But you are sure that you hadn't come down on the range at all?

"A. I am sure I wasn't on the ranges at all.

"Q. And didn't go on the ranges before the accident?

"A. No, sir."

His testimony that he did not go on the ranges before the accident is to be distrusted. He was a helmsman, not a pilot. His only duty was to move the wheel as Jordan told him. It was no part of his duty to notice lights. The Hunting Island Range lights meant nothing to him. There was no reason why he should notice them, and

he probably did not. It is especially untrustworthy in view of Jordan's statements to Church immediately after the collision that he "had just swung onto the ranges." (Apostles, p. 1106.)

ADMISSIONS OF SAMSON'S WITNESSES WHICH CORROBORATE OUR CONTENTION.

Jordan has admitted that when he first saw the oil barge and Henderson they were on the ranges (Apostles, p. 647, cf. also p. 757). It is true he denied this later and said they were above, but his first statement is undoubtedly the true one, for it is corroborated, not only by the witnesses for the libellant but by Captain Grunstad of the Daniel Kern—a witness for the Samson. Captain Grunstad says that when he passed the oil barge and Henderson they were on the ranges (Apostles, p. 883), and this is the very time Jordan first saw them, for Jordan says that as he came around the bend at Bugby he saw the Kern and oil barge pass each other (Apostles, pp. 594-595). We may therefore take their position on the ranges at this time as certain.

Now Jordan has admitted that the green light of the oil barge kept shutting out—not for one mere instant, as he afterwards testified when he was trying to avoid the effect of his admissions, but for considerable periods of time; so often and so long that he thought the oil barge was

steering badly. The obvious effect of these admissions is that the oil barge and Henderson left the range and hauled over to their starboard side just as Sullivan says they did. After Sullivan had hauled well off and straightened up again, then is probably when Jordan saw both lights again—if he did see them, as he says.

Before this trial Jordan was so insistent on this shutting out of the green light and his consequent inference that the oil barge was steering badly that the Samson's proctors evidently intended to use it as a defense. Their answer says: "The 'M. F. Henderson' and her tow were steering bad and would first open up her green light and then close it out again." (Apostles, p. 11.)

Jordan said before the Inspectors: "I knew she was steering bad. I could see first the red light, then both of them." (Apostles, p. 746.) And again, before the Inspectors (Apostles, p. 747):

"Q. What lights did you see from the Henderson?

"A. Well, she was lit up very bright; her gangway doors forward were open and I could see the reflection very plain from them, the lights themselves; also a red light; *and I hadn't determined yet whether her green light was in sight or not*, because these bright lights were so very bright that it would kind of dim this green light. And then I said to the man at the wheel, 'There's some fellow coming there; we

will have to watch him'; and just about that time she opened up her green light, and then she shut it out again.

"Mr. Snow: Shut it out?

"A. This green light, yes, sir. I says, 'That fellow is steering bad. We will have to watch him, John.' That is the man at the wheel I was speaking to. 'We will have to give him plenty of room.' So *I watched him a little bit. Pretty soon the green light opened up again a very few minutes; well, it wasn't a minute, less than a minute, a good deal; and shortly after that he blowed me one whistle. I answered.*"

Notice in this testimony that at first he couldn't see the green light at all—"I hadn't yet determined whether it was in sight," and that after the green light showed, it went out again and stayed out for some little period while Jordan "watched." He says, "And just about that time she opened up her green light, and then she shut it out again. * * * *So I watched him a little bit* (i. e., while the green light was shut out). Pretty soon the green light opened up again a very few minutes; well, it wasn't a minute, less than a minute, a good deal,"—i. e., apparently when the green light appeared this last time it was only in sight a brief time,—"*less than a minute a good deal.*"

All of which shows that the green light was out for several quite appreciable lengths of time,

and that the oil barge and Henderson were hauling off the range, as Sullivan has said.

It is true Jordan attempted to avoid this by his ridiculous assertion that the flashing out of the green light was instantaneous—as if a slay had swung across it momentarily.

But again his testimony before the Inspectors rises to refute him, and shows that in addition to some momentary shutting out there were the longer periods of shutting out to which we have directed attention.

He said before the Inspectors (Apostles, p. 748):

“Q. You say that she showed the green light at times and then would shut it out at times?

“A. There was only twice it was shut out, and then just for an instant. All the rest of the time it was in sight all the time.

“Q. Well, then she wasn’t steering very bad if she only shut it out for an instant, was she?

“A. Well, this was after the whistle that I had reference to, those whistles.

“Q. Did you notice it before?

“A. I had seen it, yes, sir. That is when I told the man at the wheel he was steering bad, to watch her.”

Counsel have attempted to make something of the fact that the Henderson and oil barge were lashed together at a slight angle, and the side lights, therefore, would show forward, not ex-

actly dead ahead, as required by the regulations, but a little across the course of the vessels. We do not attach much importance to this. We think the angle is so slight that its effect is negligible, but we point out that if it had any effect at all, it would be that the oil barge would have to turn farther to the starboard to shut out the green light than would ordinarily be the case, and that consequently the fact that she did shut it out shows she was hauling over to starboard in a marked degree. See diagram 4 of appellant's brief, where the angle at which the green light would shine across the course of the oil barge is figured at 4.82 degrees.

JORDAN'S ADMISSIONS AS TO THE PLACE OF COLLISION.

When Captain Church came on deck immediately after the collision the first thing Jordan said to him in explanation of the collision was, "I had just swung onto the ranges" (Apostles, pp. 1106-1107), which shows that he was much further out in the middle of the river than he was willing to admit at the trial.

At the investigation by the United States Inspectors he said that the river was half a mile wide and the collision occurred a quarter of a mile from the Oregon shore—i. e., in the middle of the river (Apostles, pp. 741-745)—which is, again, much nearer our point of collision than he was willing to admit at the trial.

He has said that he was 400 feet off Puget Island when he made the bend, and 800 feet at the time of collision. In other words, he has described a course which gradually leaves the island shore. Obviously, if the starting point of this course was not 400 feet from the island shore, but much further off—say in the middle of the river—it would throw the whole course that much further from the island, and the end of the course would be very close to the point where we contend the collision took place. It is important, therefore, to see whether this course did not as a matter of fact begin further from Puget Island shore than 400 feet. Jordan himself in one part of his testimony has said it did. (Apostles, p. 727.) If we understand him correctly at this part of his testimony he says that he came around the bend almost in the middle of the river—"A little closer to the island than to the Oregon side." (Apostles, p. 727, cf.; also 782-783.) It is not unlikely that he came around this bend about the middle of the river, since he was apparently expecting, if he met a vessel, to pass on the Oregon side of her to take the "long bend." He says it is customary for boats coming upstream to take the Puget Island side (Apostles, p. 637), and for boats coming down to take "the long bend" (Apostles, p. 729). Captain Church, before the Inspectors, said the Samson's usual course at the bend was in the center of the river (Apostles, p. 1108). He qualified this at the trial

by saying the course was in the center "sometimes" (Apostles, p. 1109). Finally Jordan has expressly said: "I was about the center of the river when I got his first whistle. Inspector Edwards: About the center of the river? A. Yes, sir, the middle of the channel I should judge. Inspector Edwards: When you got his first whistle? A. Yes, sir." (Apostles, p. 742.)

It is therefore possible that Jordan rounded the bend at Bugby Hole further out in the middle of the river than he should have, and because of that, and his excessive speed, and the unwieldiness of his tow, and his failure to make early efforts to haul off to starboard by putting his helm hard aport, was carried by the sweep of the current and his own momentum toward the collision at Hunt's Mill Point. As he says, "*the boat wouldn't shove the scow in. That is all there was to it.*" (Apostles, p. 659.)

THE DAMAGES.

This was a libel for a total loss. Therefore the measure of damages is the value of the Henderson when she was lost. Her market value on that day is difficult of ascertainment for the reason that there is not sufficient barter and sale and exchange of boats of her class on the Willamette and Columbia Rivers to establish a market price. There is no "market" because the dealings in boats are not extensive enough.

The rule is settled in admiralty that where there is a market, the market value is the best evidence of the true value; but that where there is no market the court will call to its aid every kind of evidence which will help it to ascertain what the true value is. In fact the court will do this anyway, for a court of admiralty is not closely restricted in the evidence it may hear, but may listen to anything that will help it to find the truth.

In Williams & Bruce's Admiralty Practice (2nd Ed.), on page 97, occurs the following language which was quoted with approval in the "H. F. Dimock," 77 Fed. 226, on page 235:

"In ordinary cases the market value of the ship immediately before her loss may be regarded as a fair measure of her value. But, in the case of a ship adapted only for special circumstances, and of such an exceptional character as to be in fact unmarketable, some other criterion must be adopted. In these cases the court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate, and the original price of the ship, its condition at the time of the loss, and the sum for which the plaintiff could have got such another ship built, may be very important matters in the calculation."

See also Leonard vs. Whitwell, 19 Fed. 547, 548.

The Lucille, 169 Fed. 719, 721.

Adopting this rule, we gave to Judge Cushman every piece of evidence which could guide him to an accurate estimate of the damages.

1. We showed by the opinion of experts what the boat was worth when she was lost—this was “market value” evidence as nearly as it could be obtained.

2. We showed by the man who built the Henderson what it would have cost to duplicate her at the time of the collision, and what the depreciation would be in ten years’ time (the age of the Henderson when lost).

3. We showed what it cost the Shaver Transportation Company in actual cash to build a new Henderson, using the salvage from the old, the new boat being a duplicate of the old.

4. We showed the value of the salvage, and the cost of making it.

5. We showed the cost of the Henderson when she was built in 1901, and added to in the subsequent years, and showed that the cost of boat building has increased twenty-five per cent since then.

6. We showed the earnings of the old Henderson.

The Henderson was a large river tow boat—158 feet long and 31 foot beam, and was also equipped for passenger traffic. She was what is

called a "combination boat." She was the best boat in the fleet of six or more steamers owned by the libellant, and was principally relied on to do libellant's heavy work. That she was powerful is indicated by the fact that at the time of her collision she was pushing an oil tank steamer 280 feet long, carrying 25,000 barrels of oil, against the current of the June freshet in the Columbia River. She was well built by probably the best builder on the Willamette and Columbia Rivers, and she had been very well taken care of. She had always been salted well and well maintained, and her depreciation was not great in the ten years of her life.

Captain J. W. Shaver, one of her owners, testified that at the time of her wreck she was worth \$45,000—that he would not have taken \$50,000 for her. (Apostles, pp. 1554-1555.)

Captain O. W. Hosford, a steamboat owner himself, and a man of long experience in the towing business on these rivers, who knew the Henderson well, testified that her value in 1911, when she was wrecked, was \$45,000 (Apostles, p. 1575); that it would have cost in 1911 \$55,000 to build a new boat like her. (Apostles, p. 1585.)

We direct the court's particular attention to the testimony of the witness J. H. Johnston (Apostles, pp. 1455-1541). This man was the builder of the Henderson, was aboard her fre-

quently up to her collision, and knew her well. He was most careful and conscientious in his testimony and we place great reliance on it, not only because of the man's high character as an expert boat builder but because of his scrupulous honesty, which is apparent even in print. His method of arriving at the value of the Henderson was to figure what it would cost in 1911 to build a new boat like her, and then to deduct certain sums for the depreciation that the Henderson would have suffered in ten years—her age when wrecked. He did not make any offhand statement. His figures are the result of several days' careful calculation of cost and depreciation. (Apostles, p. 1487.) His estimate of cost of a new boat was \$51,597.60; of depreciation for ten years \$7,709.39; leaving \$43,888.21 as the value of the Henderson in 1911. These figures with the various sums that go to make them up, all carefully itemized, will be found on Apostles, pp. 1464-1466.

This testimony was attacked because Johnston, in making up his statement of cost of a new boat similar to the Henderson, had got from Captain Shaver information as to what articles made up certain of the equipment of the Henderson. In other words, he couldn't duplicate the old Henderson without knowing what was on her. Some of these things he knew himself, some he had to ask Shaver about. Claimant contended this made his report hearsay. Not so. Johnston

in no instance took Shaver's estimate of value of an item without passing his own judgment on it. Some he accepted at the value given by Shaver, some he cut down and some he may even have increased. (Apostles, 1543-1544.) The only thing he took from Shaver was what *articles* were on the boat, not their *value*. (Apostles, p. 1544.) And Shaver testified that all the articles which he gave Johnston for the purposes of his statement were actually on the boat when she was lost. (Apostles, p. 1637.)

This testimony of Shaver's cures any possible defect in Johnston's report standing alone. Moreover, when all is said and done, the main items of cost—the big things, hull, house, boiler and engines—remain unaffected by this criticism, for Johnston knew all about them himself.

No admiralty court seeking after truth under the rules announced in the cases we have cited, could disregard this estimate of Johnston's.

SALVAGE.

There was some salvage from the Henderson, and this of course should be taken into account in determining the Shavers' loss. The salvage consisted principally in the boiler and machinery. its value was \$16,835. (Apostles, p. 1766.) There is no dispute about this. It cost the Shavers to make this salvage \$9,193.33 (Libel Ex., 31 and 32). This sum is arrived at as follows:

Cost of raising and towing to Portland. \$8424.99

Cost of straightening out wreckage
after boat was hauled out on the
ways 878.66

\$9303.65

Less a credit for return of timbers to
Eastern & Western Lumber Com-
pany 110.32

\$9193.33

The net value of the salvage is therefore its value, \$16,835, less the cost of recovering it, \$9,193.33, or \$7,641.67. This net value, \$7,641.67, is the amount the Shavers actually got out of the wreck of the Henderson, and should therefore be deducted from the value of the Henderson to determine the Shavers' actual loss.

If you take Shavers' and Hosford's estimate of value—\$45,000—and deduct \$7,641.67 the result is \$37,358.33. If you take Johnston's estimate—\$43,888.21—and make the same deduction the result is slightly less—\$36,246.54. This is the minimum that should be awarded the Shavers.

The cost of the salvage operations has been attacked by claimant. Dan Kern, president of claimant, says that \$5,000 would have been enough to pay for "raising the Henderson." (Apostles, p. 1913.) It is not clear whether he includes bringing her to Portland or not. But in

any event he does not include hauling her out on the ways and untangling the machinery and twisted iron, and straightening it out, which latter alone, exclusive of hauling out on the ways, cost the Shavers \$878.66, and is a part of their cost of salvage.

The salvage operations were difficult. Captain Shaver, who conducted them, gives this description (Apostles, pp. 1624-25):

“We found the boat near the head of Tenas Illihee Island, and in 27 feet of water, at low tide, and it being in the summer, there was quite a June freshet, and we only got slack water for about one hour before the top of the flood, which made it very bad in raising the boat, which was laying crossways of the current, and over a little more than on her beam ends. We got the derrick below her, got a hold on the top of the king post with the derrick, and run lines from the top of the hull that was out, and put the steamers—I don’t know what boats it was now. I would have to look that up to see.

“Q. Whose boats were they?

“A. They were the Shaver Transportation Company’s boats. I think the Shaver and the Cascades, but I could look that up and see exactly what boats we had. And we tried to straighten her up, and got her pretty well straightened up, but we were unable to hold

her, and we worked for some three or four days before we was able to get the boat straightened up so we could keep her right side up, and it was impossible to get chains under her before we could get her straightened up. The current runs so strongly most of the time that it was hard to make much headway. Finally, in a few days we got her straightened up and towed her inshore, and got a diver to help get the chains under, and got a barge on each side and kept lifting and at high tide we would take her in on the beach as far as we could, and then tighten up on the chains as the tide went down, until we got her up in shape so we could tow her to Portland.

“Q. How did you get the water out of her?

“A. We never got the water out of her until she was hauled out on the ways of the Portland Shipyard, but I will say that we had, at different times, four and five boats when the tide would be right, to try and straighten her up, and the day that we did get her straightened up we telephoned to Portland to Captain Dell Shaver to be sure and have the Shaver there at a certain time, and we already had the Cascades, No Wonder, Wauna and Sarah Dixon there, and also the Echo. And we had pulled on her about three hours before the Shaver arrived, but was unable to straighten her up, and by the assistance of the steamer Shaver we got

her on an even keel, and was able to hold her there.

“Q. How did you get her to float so you could tow her?

“A. We had one barge on each side, and chains under, and timbers across on the barges, and chains under the steamer Henderson, and held her up in that way. And in towing up to Portland we had the derrick scow astern, and had a chain on the shaft to help hold the wheel and stern up.

“Q. And then you brought her in to Portland that way?

“A. Yes, sir, brought her to Portland in that shape.”

And on page 1676 he says again:

“Q. Do you think it was necessary to use fifteen days in getting that boat up—reasonable time?

“A. It surely was, you bet. We never lost any time we could help. Of course, this boat was a very hard boat to raise. We have got them up in six or seven days, but it was a strong current and 27 feet of water at low tide. And we surely worked hard, and Captain Crowe was there quite a few times, and I talked to him different times; and he said he thought we were getting along as well as could be done.”

Captain Crowe was the representative of the underwriters of the Samson, who are the ones

ultimately liable in this case, under the "running down clause" of their policy, if the Samson is held at fault. (Apostles, pp. 1997-1998.) He died before this testimony on the amount of damages was taken.

Mr. Carstens, the veteran boat builder and salvor of the O.-W. R. & N. Co., called by the Standard Oil Co., and a hostile witness to us, said that he thought the cost of the salvage operations was reasonable, under the circumstances. (Apostles, p. 1899.)

One of the items of expense of salving particularly attacked was the charge made by the Shavers for their boats used in raising the Henderson—\$30 a day for the Echo, \$125 a day for the Wauna, \$150 a day for the Cascades and \$8 an hour for the other boats which were taken off their log towing service from time to time and brought to the scene of operations at hours when the tide was slack, to assist in raising the Henderson. Dan Kern, president of claimant, thought these charges should have been \$25 a day for the Echo, \$100 for the Wauna and \$130 for the Cascades. The rates charged by the Shavers for their boats were, however, the minimum rates charged by them when they performed services for outsiders, and the salvage took place in the busiest time of the year, when the demand on their boats was the heaviest and when it was a serious inconvenience to their business to withdraw these boats from it. As Captain Shaver

said himself: "As far as the fleet employed is concerned, we needed them pretty bad somewhere else. We didn't want them there." (Apostles, p. 1653.) If they had not used their own boats they would have had to hire others at the same or greater prices than they themselves charged.

Honeyman, Lloyds Surveyor, who hires boats frequently on the river, testified that the Shavers' charges were reasonable. (Apostles, pp. 1767, 1775-1778.)

Judge Cushman in his opinion said on this subject: "The work of salving was done by other of libellant's boats. It is contended that more boats than were necessary engaged in this work and that too great a charge has been made for them. It is not probable that more men or boats were used during a busy season than appeared necessary, merely for the purpose of seeking recovery at the end of a long law suit. The evidence fails to disclose that any of them were unnecessary. While the amount charged for the boats appears high, as compared with their ordinary employment, yet, when considered that the need was immediate and urgent; that libellant had to interrupt other employments in which the boats were engaged, to secure their services, the charge does not appear excessive." (Apostles, pp. 64 and 65.)

The loss to the Shavers then, ascertained in the method we have pursued, is \$36,246.54, if

you accept Johnston's estimate of value, or \$37,-358.33 if you accept Hosford's and Shaver's estimate of value.

This result may be checked by supposing for a moment that the Henderson had not been a total loss but had been repaired. In other words, if you treat the new Henderson, which was built around the machinery of the old Henderson, not as a complete rebuilt new boat, but as the old Henderson repaired, and take the amount of money the Shavers actually spent in cash to make the new boat and allow a reasonable amount for demurrage during the time of rebuilding (which is the rule where repairs are made, Spencer on Marine Collisions, Sec. 204) you get a very close check on the amount of damages which we have asked for. In building the new Henderson the Shavers spent the following sums, as shown by libellant's exhibit No. 28:

Material and labor	\$27,726.68	
Cost of raising the Henderson and towing her to Portland, etc.	\$8,424.99	
Less credit for timbers returned	110.32	
	<hr/>	8,314.67
Cost of straightening out the wreckage after the wreck was hauled out on the ways		876.66
Total		<hr/> \$36,917.91

This is the money actually spent by the Shavers in building the new boat. The new boat, however, was short on equipment as compared with the old. The value of the equipment which was on the old boat and was lost and was not put on the new boat was \$1,385.48. This, therefore, should be added to the amount of cash expended. There should also be added a reasonable allowance for demurrage. The demurrage allowed by Captain Crowe, surveyor for the underwriters of the Samson, was one hundred and fifty days at \$30.00 a day, or \$4,500.00. Adding these three sums gives the following result: \$36,917.91, money actually expended; \$1,385.48, value of equipment lost on the old boat and not on the new; \$4,500.00 demurrage; total \$42,803.39. This would be the Shavers' actual damage if the new Henderson be considered not as a new built boat, but as a repair of the old. Nor could there be any deduction from this amount under the rule of "new for old," for that rule is applicable to insurance cases but not to this. Spencer on Marine Collisions, Sec 199, says:

"The owner is entitled to recover as damages whatever sum is found necessary to restore his vessel to the condition it was in before the collision, notwithstanding that in making the repairs new and more valuable materials are used than were in the vessel at the time of receiving the injury; subject, however, to the general provision of law that the owner may

not captiously insist on repairs where such repairs would equal or exceed the value of the vessel at the time of the collision.

“In all cases the measure of indemnity is co-extensive with the injuries received; and the fact that new and better material entering into the repairs may render it better than before the collision, affords no reason for an allowance for such bettered condition. In making repairs in collision cases, a different rule prevails than in insurance cases, where an allowance is usually made for new material; in collision cases no such allowance is permitted.”

As another indication of the Shavers' loss we showed the net earnings of the Henderson for the two and a half years prior to her collision. These were \$38.79 a day in 1909, \$38.30 a day in 1910 and \$21.42 a day for the year 1911 up to the time the boat was wrecked, or an average of \$35.36 a day. (Apostles, pp. 1157-1559.) The earnings were less in 1911 because the lumber mills were not running full capacity in January and February of that year. (Apostles, p. 1741.)

The estimate which Johnston and Shaver made of \$50,000 as, in round numbers, the cost of building a complete new Henderson in 1911, is corroborated by looking at the cost of the old Henderson in 1901 and the subsequent years, when additions were made to her, and adding to this the proper percentage on account of the in-

creased cost of building boats in 1911. This increased cost is due to the increase both in labor and materials and is testified by the experts, even the hostile ones, to be about twenty-five per cent. (Johnston, Apostles, p. 1466; Supple, p. 1789.) The cost of the old Henderson in 1901 was \$39,393.42 (Apostles, pp. 1986 and 1987), or in round numbers \$40,000.00. Increase this twenty-five per cent and the result is \$50,000.00. Johnston's estimate of the cost of the new boat was \$51,597.60 (Apostles, p. 1465), so the two are fairly close together.

It was contended by claimant at the trial that the Henderson's hull could have been repaired and should not have been discarded as a total loss. We ask your Honors to look at the photographs of her, which libellant has introduced. She was "hogged" so that her stern was dropped down four feet, and she had a bad twist in her so that it would have been impossible ever to put her in as good shape as she was before. If she had been straightened she would have been hanging entirely on her hog chains instead of being stiffened partly by her kelsons. (Shaver, Apostles, pp. 1616-1617.)

Johnston says that if she had been his he would have floated her off and burnt her. (Apostles, p. 1542.)

Shaver says she wasn't worth repairing and describes her condition. (Apostles, pp. 1616-1617, 1672.) He offered to Kern to repair the

hulk and sell it to him for \$2,000, and the repairs cost \$1,800. This was practically offering the boat for the cost of repairs and Kern wouldn't take it. (Apostles, p. 1634.)

Nelson says that the value of the old hulk was nothing, that it could not be repaired without a complete rebuilding. (Apostles, pp. 1755-1756, 1762.)

Honeyman says the same. (Apostles, p. 1780.)

Carstens, a hostile witness to us, says that the hulk was worth nothing; "as far as that goes I wouldn't give a dollar for it." (Apostles, p. 1888.) He would have rebuilt new. (Apostles, p. 1902.)

Captain Crowe, in his report to the underwriters of the Samson, recommended building anew. (Apostles, p. 2001.)

CONCLUSION

We want to say a word in conclusion. Claimant and the respondent, Standard Oil Company, at the trial introduced evidence that the Henderson was not worth over \$25,000.00; that she could have been repaired for \$16,000.00, and the suggestion was made at the trial by one of the proctors for the Standard Oil Company that in these collision cases the libellant always estimated his loss too high and the defendants always estimated it too low in the expectation that the court would split the difference. We urge your Honors as earnestly as we can not to be guided by such

an idea in making your award of damages. The Shavers have gone about the estimate of their loss as honestly and conscientiously as it could be done. Even if they are awarded the full amount which we ask, in round numbers \$37,000.00, they will not be made whole, for they will be paid nothing for the time that was lost in building their new boat. They lost the use of the best boat in their fleet and were not able to replace it for about a year, and for this loss they got nothing because, this libel having been for a total loss, demurrage is not allowed. The Shavers are honest, hard working river men, who have built up their business by plain, straightforward honesty, and in making up their statement of damages in this case they have not added one single dollar to which they are not entitled. They have even cut out a few items which appeared to them to be doubtful charges against those at fault for this collision. We say to the court again with all the earnestness we can put into it that the Shavers did not make their estimate of damages high with the expectation that the court would cut it down, but have asked only for just what was due them. Even Captain Crowe, Mr. Honeyman and Mr. Carstens, the men who surveyed the wreck, Captain Crowe and Mr. Honeyman for the underwriters and Mr. Carstens for the Standard Oil Company, all hostile witnesses to us, were willing to allow the Shavers \$34,886.54. (Apostles, p. 2003.)

Judge Cushman refused to allow the Shavers the full amount they asked because he thought that Johnston's estimate of depreciation was not large enough, and therefore cut down the award \$5,000. (Apostles, p. 64.) This, in our view, was not justified. Johnston, a man of lifelong experience in both hulls and machinery, did not lump off his depreciation in one sum, but estimated it very carefully, item by item,—forty per cent on the hull, eight per cent on the house, eighty per cent on the painting, two per cent on hog chains, rudder stocks, cavel, cleats, chalks, etc. (in other words, iron work on which there was little wear), fifteen per cent on the boiler, and so on. It is in evidence that the Henderson had been remarkably well kept up, that repairs had been made on her whenever necessary, that at the time of the collision she was good for two or three years more without spending anything on her, and at the end of that time an expenditure of a few thousand dollars would have made her good for another ten years. Carstens, a hostile witness, says \$6,000 would have done this. (Apostles, p. 1899.) Shaver says less. In view of the foregoing, we think that Johnston's estimate of depreciation is as accurate as could be had and that Judge Cushman's reduction of the award because he thought the depreciation was not figured high enough was not warranted, and we earnestly urge your Honors to raise the award to the sum that will come more nearly making the Shavers whole.

This sum we ask from the claimant. But if your Honors believe that the oil barge was responsible for the collision, then we ask this sum from the respondent, Standard Oil Company, since it is conceded that the Standard Oil Company had our boat under its sole command and control. We are entitled to recover from one or the other, or both.

Some assignments of error were made on account of the award of costs. We do not care to lengthen this brief by the citation of authorities, but refer to Judge Wolverton's opinion, *Apostles*, pp. 85-89, in support of the award.

Respectfully submitted.

C. E. S. WOOD,
ERSKINE WOOD,
Proctors for Libellant.





